Supreme Court, U. S.
FILED
NOV 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-585

DOUBLEDAY & COMPANY, INC.,
Petitioner,

v.

PAUL BINDRIM,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 19, 1979

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Pursuant to Rule 24 of the Rules of this Court, Doubleday & Company, Inc. ("Doubleday") replies to respondent's Brief in Opposition to Doubleday's Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Respondent's Brief does not comply with Rules 24 and 19 of the Rules of this Court in that it does not present any reasons why a Writ of Certiorari should be denied. Indeed, respondent does not challenge the significance of the ques-

tions raised in Doubleday's Petition but surprisingly highlights the constitutional importance and wide-ranging effects of the issues presented in this case.[1]

Notwithstanding respondent's gross misstatements and mischaracterizations of the record below, it is plain upon review of Doubleday's Petition and respondent's Brief in Opposition that the treatment accorded publishers' established First Amendment protections by the courts below necessitates a careful review and reversal of the ominous intrusions permitted by the California courts so as to prevent the decisions below from having a truly catastrophic effect upon essential freedoms of press.

Despite respondent's agreement that clear constitutional questions are present in this case, respondent, in his Brief in Opposition, includes several egregiously misleading statements which must be addressed in this reply. First, contrary to respondent's contentions the fact that Doubleday received not even the most perfunctory hearing on the sequence of events surrounding its receipt of respondent's vague and conclusory demand letter *after the publication of Touching*[2] is nowhere better established than in the Court of Appeal's decision erroneously concluding that Doubleday had licensed the paperback rights to *Touching after* the initial hardback publication of the novel and *after* Doubleday had received respondent's demand letter.[3] Simply,

[1] *See* respondent's Brief at 1-2.

[2] *See* Doubleday's Petition at 29 *and* respondent's Brief at 14-16.

[3] As we have shown in our Petition, the paperback license was granted to New American Library well in advance of both hardback publication and Doubleday's receipt of Bindrim's demand letter. *See* Doubleday's Petition at 15n.13.

this issue was never raised or contemplated as a basis for liability under the "actual malice" standard, nor could it have been because the basis for respondent's complaint against Doubleday was its publication of the hardback edition of *Touching*. No court has ever determined that the mere license of paperback rights can impose liability in a public figure libel action when there has been a judicial determination that the original publication was not made with constitutional "actual malice." Just as clearly, such an erroneous contention cannot be permitted to stand as "sufficient evidence to permit the conclusion that [Doubleday] *in fact entertained serious doubts as to the truth of* [*its*] *publication*"[4] under the liability standards established in *New York Times Co.* v. *Sullivan*.[5]

Secondly, in purporting to show that Doubleday did not comply with the interim standards[6] governing publisher liability set out by the Court in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 155 (1967), respondent has quoted from the testimony below of Mr. Robert Gutwillig for the proposition that "the matter of determining whether a fictional character in a novel is indeed a representation of an actual person '*is not one that can be resolved simply by the expedience of asking the author and stopping there.*' "[7] Respondent conveniently ignores the fact that the foregoing statement to which he calls attention was that *of respondent's counsel* and that Mr. Gutwillig's testimony in response

[4] St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added) (hereinafter *"St. Amant"*).

[5] 376 U.S. 254, 279-80 (1964) (hereinafter *"New York Times"*).

[6] This interim standard was that of "the responsible publisher" and was subsequently abandoned in *St. Amant, supra*, 390 U.S. at 731.

[7] *See* respondent's Brief at 12-13 (respondent's emphasis).

to counsel's hypotheticals presupposed both that an editor was conducting a *pre*-publication review of a manuscript and that the editor had *actual knowledge* that the character represented in the manuscript to be fictional was *in fact* a living individual. (R.T. 574-77.) To contend in such circumstances that no pre-publication investigation is necessary would be ludicrous; but, in attempting to compare that situation with the one Doubleday faced upon receiving respondent's vague letter *after* the publication and distribution of *Touching* and *after* Mrs. Mitchell had warranted and represented for a *third* time that the characters in her novel were completely fictional and that respondent's letter was totally unfounded, respondent has not only misinterpreted Mr. Gutwillig's testimony as well as the *Butts* liability standards for "responsible publishers," but has also accentuated the reasons why the "rule" enunciated below is both unconstitutional and functionally unsound.

The enhanced "duty to investigate" which the California courts would impose upon publishers focuses upon the activities of a publisher *after* publication and dissemination of the work in question. Thus, it was precisely because Doubleday's pre-publication review and examination of its author yielded nothing upon which subjective knowledge of serious doubt as to the truth of its publication could even remotely be based that neither the jury, the trial court nor the California Court of Appeal found that Doubleday had acted with "actual malice" in its publication of *Touching*. Instead, the Court of Appeal, on its own initiative, determined that liability attached because of the events which occurred *after* the publication of *Touching*. In choosing

this time frame as the basis for the imposition of liability, the court discarded the "actual malice" standard as it properly applies to a publisher's subjective awareness of libelous material in the pre-publication period and substituted its own erroneous and unconstitutional strict liability standard which imposed liability for Doubleday's not acceding to the demands contained in a vague lawyer's letter received after publication and the licensing of paperback rights. By changing the vantage point for judicial determinations and thus converting the "actual malice" standard into one of absolute liability, the "rule" below effectively chills free speech and imposes prior restraints upon the publishers of critical fiction who, because they are unable to check every word and thought of authors, would therefore be absolutely precluded from printing such works.[8] Such a shocking disregard for this Court's decisions clearly mandates a review and reversal of the decisions below.

Like the courts below, respondent apparently refuses to accept the *New York Times*,[9] *Gertz*[10] and *St. Amant*[11] holdings that a publisher's failure to investigate cannot establish liability under the "actual malice" standard. Respondent would instead have this Court ratify the decision below and impose upon publishers (as a *constitutional* requirement) an enhanced "duty to investigate" even those un-

[8] *See* Brief of the Association of American Publishers, Inc. as *amicus curiae* (filed November 15, 1979) at 10n.5.

[9] 376 U.S. at 263.

[10] Gertz v. Robert Welch, Inc., 418 U.S. 323, 332 (1974).

[11] 390 U.S. at 733.

substantiated claims made in the post-publication period.[12] The result under the facts of this case would also be the imposition of a duty to police and control the acts of publishers' independent licensees (the identity of which could easily be discovered and who could easily be joined by a plaintiff in any subsequent legal action). Such a "rule," of course, would be a clear intrusion upon the First Amendment freedoms accorded publishers since the *New York Times* case and is, moreover, expressly contrary to this Court's defined standards for establishing a publisher's "actual malice."[13] Accordingly, the decision below cannot be allowed to stand.

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[12] Notably, respondent and the Court of Appeal would apparently impose the requirement to check with the individual claiming to have been libeled (as a part of a publisher's enhanced "duty to investigate" in the post-publication period), despite the fact that that individual had already retained counsel and expressed his intention to bring an action against the publisher. *See* respondent's Brief at 12 (purportedly as to what Doubleday's investigation "would have produced") *and* Exhibit 4 to Doubleday's Petition (demand letter from respondent's counsel: "Additionally, my client intends to seek damages from you, as allowed by law, for your wrongful conduct.").

[13] While respondent has not "deemed" it necessary to discuss or even to address the punitive damage point in our Petition aside from denying the applicability of the *Cantrell* and *Curtis Publishing Co.* decisions (*see* respondent's Brief at 18 and n.8), suffice it to say that the clear absence of any "ill will" or "venting of the spleen" (in addition to an absence of "actual malice") by Doubleday renders the punitive damage award in this case completely illegitimate and unconstitutional. *See also* Brief of the Association of American Publishers, Inc. as *amicus curiae* (filed November 5, 1979) at 12-18.

Conclusion

For the foregoing reasons, as well as for those set forth in Doubleday's Petition, the Writ of Certiorari should be granted and the decisions of the courts below should be reversed.

Respectfully submitted,

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